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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 986

JOSEPH E. SEAGRAM & SONS, INC.,
Petitioner,

vs.

ISADORE LEVIN,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION HEREIN FOR A WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION HEREIN FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

POINTS IN OPPOSITION TO PETITION.

At the outset, in opposition to the petition herein, we desire to call the attention of the Court to a number of erroneous statements and assumptions in the petition, which we consider material in determining the right of the petitioner to a writ of certiorari.

I.

On Page 1 of the petition, the statement made that the respondent was run over by the right rear wheel of the petitioner's truck is incorrect. The truck in question was

a tractor-trailer unit (R. 127) and the respondent was run over by the right rear wheel of the tractor (R. 117) or what also served as the right front wheel of the trailer.

On Page 2 of the petition, the statement made that there was a vicious conflict between the testimony of the petitioner's witnesses and that of the respondent in regard to material facts (similar statements are made on pages 5, 10, and 19 of the petition) is erroneous and not supported by the record.

The Circuit Court of Appeals in its opinion found that no sharp conflict existed and that the stories of the witnesses were not in serious conflict (R. 260). Likewise, the District Court held that there was nothing unusual about this case requiring anything different from the ordinary instructions (R. 159). At the conference when said statement was made by the District Court, counsel for the petitioner made no claim that any serious conflict in the evidence existed (R. 159-161). Likewise the objection to the charge by counsel for petitioner was not based on the ground that there was a serious conflict in the evidence (R. 202). No such contention was made in the petition for rehearing (R. 265-267). It is made for the first time in this court.

On Page 3 of the petition, the statement made that the (police) officer told the respondent that the tractor-trailer unit was going to back into the driveway is erroneous. The testimony of the said police officer, Hansen, was that he told the respondent to pull up his wagon a little further as the truck was going to back in; that he did not tell the respondent where the truck was going to back in (R. 120). The record does not show, and no claim is made, that the respondent had any notice, knowledge or warning that the truck was going to be jack-knifed or moved laterally to the south.

On Page 4 of the petition, the statement made that before the driver started the backing (jack-knifing) operation he received a hand signal from the police officer to back up is erroneous. The police officer (Hansen) did not so testify. According to Hansen's testimony, he was at that time walking west on the south side of North Avenue and did not stop at any point until he came to the elevated structure (R. 116-117). The officer, therefore, could not have given a hand signal. Moreover, even if he had given a hand signal, it would have been impossible for the driver to see it, since the officer was on the south side of the street while the driver was looking north through the left side door of the cab and his view to the south and west was obstructed by the large body of the trailer (R. 141). See photographs of truck at record 211, 212.

II.

On Page 6 of the petition, four allegedly involved questions are presented. Question No. 1 erroneously assumes that the Circuit Court of Appeals held that under Rule 51 of the Federal Rules of Civil Procedure, a trial court may refuse to inform counsel of its proposed action on requested instructions. The opinion of the Circuit Court of Appeals shows that it did not so hold, but instead, held that counsel was fully informed (R. 257-259). Therefore, there is no such question before this Court.

Question No. 2 erroneously assumes that the Circuit Court of Appeals held that in order to preserve an objection under said Rule 51, it is necessary for counsel to refuse to proceed with the trial. The opinion of the Circuit Court of Appeals shows that it did not so hold but merely held that counsel made no request to read the instructions (R. 258-259) and therefore, there is no such question before this Court.

Question No. 3 erroneously assumes that the Circuit Court of Appeals held that under said Rule 51, counsel is required to state in the presence and hearing of the jury that he has objections to the charge to the jury. The opinion of the Circuit Court of Appeals (R. 254-260) shows that the Court did not consider or pass upon such question and therefore, the same is not before this Court.

Question No. 4 erroneously assumes that the Circuit Court of Appeals held that where there exists a severe conflict between the testimony of the parties, the trial Court is justified in refusing an instruction that, in weighing the testimony of the plaintiff, the jury may take into consideration the fact that he is interested in the result of the suit. The opinion of the Circuit Court of Appeals shows that it did not so hold (R. 259-260). It merely held that there was no serious conflict in the evidence and therefore the refusal to give said instruction was not prejudicial error. Therefore, there is no such question before this Court.

III.

On Pages 6 and 7 of the petition, three reasons are given for the allowance of the writ of certiorari. The first one is that the Circuit Court of Appeals has misinterpreted and incorrectly applied Rule 51 of the Federal Rules of Civil Procedure. That reason is based, as heretofore pointed out, on a misconception of the holding of the Circuit Court of Appeals.

The second reason is that the decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeal on the same matter. There is nothing in the petition to support that assertion. On the contrary, counsel for petitioner admits, at the bottom of Page 16 of the petition, that he has been unable to find any decisions on this point. On the question of whether

counsel for petitioner was properly informed regarding the charge to the jury, and whether he made a proper objection, the holding of Circuit Court of Appeals is supported by *Dallas Ry.* v. *Sullivan,* 108 F. (2d) 581, at page 583 (C. C. A. 5, 1940).

The third reason is that the decision of the Circuit Court of Appeals is in conflict with the Illinois decisions. That evidently has to do with the holding of the Circuit Court of Appeals that the trial court did not err in refusing to give a certain instruction. The opinion of the Circuit Court of Appeals (R. 259-260) shows that its decision is in accordance with and supported by *Korn* v. *Chicago Rys. Co.,* 271 Ill. 329, 334, 335, 111 N. E. 85, 87, 88 and therefore, is not in conflict with the Illinois decisions.

IV.

On Page 8 of the petition, four errors are assigned. The first one erroneously assumes that the Circuit Court of Appeals held that the District Court refused to inform counsel for the defendant of the substance of the requested instructions and that such refusal did not constitute error. The opinion of the Circuit Court of Appeals shows (R. 257-258) that it held that counsel for the petitioner was sufficiently informed and was evidently satisfied with the information, since he made no request for time to read the instructions.

The second one erroneously assumes that the Circuit Court of Appeals held that the trial court required counsel for the defendant to state in the presence and hearing of the jury that he had objections to the charge and that the action of the trial court did not constitute error. The fact of the matter is that the trial court did not require counsel for the defendant to state in the presence and hearing of the jury that he had objections to the charge (R.

200-201). Furthermore, the Circuit Court of Appeals did not consider or pass upon such point. That is admitted by the petitioner at the bottom of Page 15 of the petition.

The third and fourth assigned errors may be considered together, since both involve the holding of the Circuit Court of Appeals with reference to the instruction heretofore referred to. We submit that the Circuit Court of Appeals correctly held, and the record herein, as we heretofore pointed out, supports that holding, that the stories of the witnesses were not in serious conflict as to what happened. Therefore, it was not prejudicial error to refuse to instruct the jury that, in weighing the testimony of the plaintiff, they could consider the fact that he was interested in the result of the suit (R. 260).

From the foregoing, it is clear that the said alleged questions presented, reasons for the writ and assignment of errors are all based on a misconception or distortion of the holding of the Circuit Court of Appeals. Therefore, the petition herein presents no question which merits any consideration by this Court.

PROPOSITIONS OF LAW RELIED ON.

I.

The Court Did Not Refuse to Advise Counsel for Petitioner, Before Argument, of His Proposed Action on the Requested Instructions to the Jury.

Rule 51 of Federal Rules of Civil Procedure.

Dallas Ry., etc. v. *Sullivan*, 108 F. (2d) 581, 583 (C. C. A. 5, 1940).

II.

The Court Did Not Require Counsel for Petitioner to Make His Objections to the Charge in the Presence and Hearing of the Jury.

Rule 51 of Federal Rules of Civil Procedure.

See Argument.

III.

The Refusal of the Court to Give an Instruction on the Weight of Plaintiff's Testimony Was Not Prejudicial Error, Since There Was No Serious Conflict in the Evidence, and Since the Testimony of the Respondent Was Corroborated by a Disinterested Witness.

Korn v. *Ch. Rys. Co.*, 271 Ill. 329, 334, 335, 111 N. E. 85, 87, 88.

IV.

The Concurrent Findings of Fact of Two Courts Below, Not Shown to Be Plainly Erroneous, Are Accepted as Conclusive by This Court.

Anderson v. *Abbott*, 321 U. S. 349, 356 (1944).

Alabama Power Co. v. *Ickes*, 302 U. S. 464, 477 (1938).

Virginian Ry. v. *Federation*, 300 U. S. 515, 542 (1937).

V.

This Court May Not Reverse a Judgment on a Verdict of a Jury Except for Prejudicial Error Affecting Some Substantial Rights of the Petitioner. The Petition Herein Fails to Show That the Court's Action Complained of Prejudiced the Petitioner in Any Form or Manner.

Judicial Code, Sec. 269 (28 U. S. C. A. 391).

Rule 61 Fed. Rules of Civil Procedure.

Berger v. *U. S.*, 295 U. S. 78, 82 (1935).

Dallas Ry. v. *Sullivan*, 108 F. (2d) 581, 584 (C. C. A. 5, 1940).

ARGUMENT.

I.

The record herein (R. 159-160) shows that Mr. Vogel, the attorney for the petitioner, was fully informed by the Court of the substance of the charge to the jury. That he was fully satisfied with the information given him by the trial judge is evident from the fact that he did not request any further information and made no compliant or objection that the information was insufficient. He did nothing to indicate that he was not fully satisfied. The holding of the Circuit Court of Appeals on that point is fully supported by the holding in *Dallas Ry., etc.* v. *Sullivan*, 108 F. (2d) 581, at Page 583.

The complaint by counsel for the petitioner that the trial court refused to inform him of the substance of the charge to the jury was a mere afterthought and was raised for the first time on appeal.

Furthermore, as pointed out in the opinion of the Circuit Court of Appeals (R. 259), the petitioner has not shown that the Court's action in this regard was prejudicial.

II.

The record herein shows (R. 200-201) that when counsel for petitioner indicated that he desired to make objections to the Court's charge to the jury, the Court and counsel immediately retired to chambers, where the objections were presented and argued. In answer to the statement by counsel that he thought he was prejudiced, the Court replied (R. 201):

> "The Court: You made no objection in the presence of the jury yet."
>
> * * * * * *

> "The Court: Let the record show we retired immediately to chambers at Mr. Vogel's suggestion, and not a suggestion that the jury could hear, in regard to any objection that I know of."

Furthermore, the jury was fully instructed as to the right and duty of an attorney to make objections during the trial (R. 196). Also, the petitioner fails to show how or in what respect it was prejudiced by the alleged error, if any.

III.

The holding of the Circuit Court of Appeals that the trial court did not err in refusing to instruct the jury that the plaintiff's interest in the case might be considered in weighing his testimony, as there was no serious conflict in the evidence and as the testimony of the respondent was corroborated by a disinterested witness (R. 260), was not in conflict with the Illinois decisions. On the contrary, it is in accordance with the law as held in *Korn* v. *Chicago Rys. Co.*, 271 Ill. 329, 334, 335, 111 N. E. 85, 87, 88.

The contention of the petitioner that there was a serious conflict between the testimony for the petitioner and that of the respondent is without any merit and not supported by the record. We have heretofore pointed out that the petitioner made no such claim in the trial court.

North Avenue, where the accident took place, runs east and west. The truck involved was a tractor-trailer unit (R. 127). Immediately before the accident, the truck was standing on the eastbound street car tracks on the south side of North Avenue in a straight east-west position (R. 17, 114, 122, 123).

The respondent picked up some paper about 3 or 5 feet south of the part of the truck where the tractor and trailer were coupled together (R. 57, 117). As the respondent started to walk towards the south curb, the truck started

a jack-knife or lateral movement to the south and the right front corner of the trailer struck the respondent in the back of the shoulder, knocking him down (R. 20, 21). The right rear wheels of the tractor (not the trailer) continued to move south and ran over both legs of the respondent (R. 20, 21). By the driver's own admission, he was looking north through the left door of the cab or tractor while he was jack-knifing or moving the center of the truck south (R. 141). It is not denied that the driver gave no warning whatever while making the said most unusual and unexpected jack-knife or lateral movement to the south.

At the time the driver was jack-knifing the truck, and at the time of the accident, the defendant's witnesses, Hornburg (R. 101), Smith (R. 115), and Meador (R. 125), were on the north side of the truck and their view was obstructed by the large body of the trailer. See photographs of truck at record 211, 212. The police officer, Hansen, was at the time walking west to halt the eastbound traffic (R. 123), and he turned east just when the respondent was run over (R. 116, 117).

Therefore, the said witnesses for the defendant could not and did not see the accident and to refer to them as eye-witnesses, as the petitioner does, is, to say the least, incorrect and misleading. The only eye-witness to the accident was Edward B. Simon, a witness for the respondent. He was on the south side of North Avenue and saw the accident in its entirety (R. 15-22). As stated in the opinion of the Circuit Court of Appeals, the story of the said witness corroborated the plaintiff and was not contradicted (R. 260).

We therefore submit that the holding of the Circuit Court of Appeals that the stories of the witnesses herein were not in serious conflict as to what happened is fully supported by the record.

IV.

A consideration of the four alleged errors assigned by the Petitioner (Petition, page 8) shows that they involve mere questions of fact, rather than errors of law. They are (1) whether the Court refused to inform counsel regarding the requested instructions; (2) whether the Court required counsel for the defendant to state his objections in the presence of the jury; and (3 and 4) whether there was a conflict in the evidence. Both the District Court and the Circuit Court of Appeals found against the defendant on all of said facts.

This Court held that the concurrent findings of fact of two courts below, not shown to be plainly erroneous or unsupported by the evidence, are accepted as conclusive by this Court.

Anderson v. *Abbott*, 321 U. S. 349, 356 (1944).

Alabama Power Co. v. *Ickes*, 302 U. S. 464, 477 (1938).

Virginian Ry. v. *Federation*, 300 U. S. 515, 542 (1937).

V.

In the opinion of the Circuit Court of Appeals (R. 259), the Court said: "Certainly the defendant has not shown that the Court's action in this case was prejudicial." Likewise, in this Court, the petition fails to show how or in what respect the petitioner was prejudiced by the alleged errors, if any.

Section 269 of the Judicial Code (28 U. S. C. A. 391) and Rule 61 of the Federal Rules of Civil Procedure provide, in substance, that the Court must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. By reason of said provisions, it is not enough for the petitioner merely to complain about errors in the record. The errors com-

plained of must be shown to be prejudicial, resulting in a denial of some substantial right in order to entitle the petitioner to relief. The petitioner has failed in that respect.

Berger v. *U. S.*, 295 U. S. 78, 82 (1935).
Dallas Ry. v. *Sullivan*, 108 F. (2d) 581 at page 584 (C. C. A. 5, 1940).

Conclusion.

In conclusion, we respectfully submit:

1. That the Circuit Court of Appeals did not misinterpret or incorrectly apply Rule 51 of the Federal Rules of Civil Procedure.

2. That the decision of the Circuit Court of Appeals is not in conflict with any applicable Federal or Illinois decision.

3. That the petition fails to show any adequate reason under Paragraph 5 of Rule 38 of this Court why certiorari should be granted.

4. That the petition presents no question whatever which merits review by this Court.

We therefore respectfully submit that the petition herein for writ of certiorari should be denied.

Respectfully submitted,

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No. 986

JOSEPH E. SEAGRAM & SONS, INC.,
Petitioner.

vs.

ISADORE LEVIN,
Respondent.

Petition of Joseph E. Seagram & Sons, Inc., for an Order Staying the Execution and Enforcement of the Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, Pending Disposition of Writ of Certiorari Now on File in the Supreme Court of the United States.

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Of Counsel.

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Petition of Joseph E. Seagram & Sons, Inc., for an Order Staying the Execution and Enforcement of the Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, Pending Disposition of Writ of Certiorari Now on File in the Supreme Court of the United States.

Your Petitioner Joseph E. Seagram & Sons, Inc., respectfully presents this its application for an order staying the execution and enforcement of the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, rendered in the above-entitled cause, on the 17th day of January, 1946, which

judgment was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit on the 23rd day of November 1946. This application is made under the provisions of Section 350, Title 28 of the United States Code Annotated, pending the disposition of the petition for Writ of Certiorari now on file in this Court.

STATEMENT OF FACTS.

Your Petitioner respectfully presents the following facts in support of said petition:

This is a personal injury action in which judgment was rendered by the U. S. District Court on the verdict of a jury in the amount of $22,000 against this petitioner.

The decision of the Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the District Court in this cause was rendered on November 23, 1946.

A Petition for Rehearing filed on December 7, 1946, was denied on December 19, 1946. On December 30, 1946, a Mandate issued from the Circuit Court of Appeals to the United States District Court for the Northern District of Illinois without notice to this Petitioner. A Petition to Recall the Mandate pending application to the Supreme Court of the United States for Writ of Certiotari under Section 350, Title 28 United States Code Annotated, was filed on January 2, 1947. This petition was denied on January 13, 1947.

On January 17, 1947, your Petitioner presented to the United States District Court for the Northern District of Illinois, Eastern Division, a Motion to Stay Execution on the Judgment, which motion was denied on January 22, 1947. The denial was on the theory that the

District Court had no control over the case and not upon the ground that no questions existed for a Writ of Certiorari. Inasmuch as the Mandate had issued from the Circuit Court of Appeals to the District Court on December 30, 1946, your Petitioner respectfully submits that the reasoning supporting the District Court's refusal to stay execution was erroneous.

Keyes v. *U. S. Fidelity & Guaranty Company* (DC Fla.) 44 Fed. Supp. 723.

Under Section 350 of Title 28, United States Code Annotated, the time within which your Petitioner may apply for Writ of Certiorari will not expire until March 7, 1947. The necessary copies of the Petition for Writ of Certiorari and Transcript of the Record were forwarded to the Clerk of the Supreme Court of the United States on February 1, 1947.

GROUNDS UPON WHICH PETITION FOR CERTIORARI IS BASED.

It is contended by this petitioner that the decision of the United Sates Circuit Court of Appeals erroneously interpreted and applied Rule 51 of the Federal Rules of Civil Procedure. Specifically, the United States District Court refused to inform this petitioner of its proposed action upon requested instructions prior to the arguments to the jury. Furthermore, this Petitioner was required to state in the presence and hearing of the jury that he objected to the charge of the court to the jury (which issue the Circuit Court of Appeals refused to decide directly). It is the contention of this Petitioner that such action of the United States District Court, which was affirmed by the Circuit Court of Appeals, clearly violates the plain language, spirit and purpose

of Rule 51 of the Federal Rules of Civil Procedure and that the questions presented in the trial of this cause under Rule 51 are questions heretofore undecided and should be decided by this Court.

Inasmuch as there existed a severe conflict between the testimony of the plaintiff and the testimony of the defendant's witnesses in this case, it is the contention of this Petitioner that the United States Circuit Court of Appeals erroneously affirmed the action of the United States District Court in refusing this Petitioner's requested instruction that the jury, in weighing the plaintiff's testimony, could take into consideration the fact that the plaintiff was interested in the result of the suit. This holding by the Circuit Court of Appeals is contrary to the decisions of other Circuit Courts of Appeal and in conflict with local (Illinois) law on this point as more fully appears in the brief and argument supporting the Petition for Writ of Certiorari. It is further contended that the holding of the Circuit Court of Appeals was based upon an erroneous understanding of the record in this cause.

REASONS WHY A STAY IS DEEMED NECESSARY.

Inasmuch as the time within which this Petitioner may apply for Writ of Certiorari does not expire until March 7, 1947, and in view of the fact that the respondent threatens to sue out a Writ of Execution and levy upon the property of this Petitioner to enforce the judgment, it is deemed necessary that a stay of execution be ordered pending the disposition of this Petitioner's Writ of Certiorari now on file in the Supreme Court of the United States.

Wherefore, your Petitioner prays that an order be entered staying Execution on and enforcement of the judgment in this cause upon such bond as this Court shall fix.

EDWARD R. ADAMS,
Counsel for Petitioner.

LESLIE H. VOGEL,
FORREST S. BLUNK,
MILLER, GORHAM, WESCOTT AND ADAMS,
VOGEL & BUNGE,
Of Counsel.

I hereby certify that the necessary copies of the Petition for Certiorari and Transcripts of the Record were forwarded by this Petitioner to the Clerk of the Supreme Court of the United States on February 1, 1947, and I believe there is merit in the cause of this Petitioner and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be reversed by the Supreme Court of the United States.

EDWARD R. ADAMS,
Counsel for Petitioner.